STATE OF MICHIGAN
IN THE SUPREME COURT

On Appeal from the Michigan Court of Appeals

HEATHER LYNN HANNAY,

Plaintiff-Appellee,

v

MICHIGAN DEPARTMENT OF TRANSPORTATION,

Defendant-Appellant.

Docket No. 146763

Court of Appeals No. 307616

Court of Claims No. 09-116 MZ(A)

AMICUS CURIAE BRIEF OF THE NEGLIGENCE LAW SECTION OF THE STATE BAR OF MICHIGAN

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On behalf of
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STATEMENT OF INTEREST OF AMICUS CURIAE

The Negligence Law Section of the State Bar of Michigan is a practice section of the State Bar comprised of roughly equal numbers of both Plaintiff and Defense attorneys who practice negligence law. The Negligence Law Section is one of the largest single sections of the State Bar and is composed of roughly 2,000 members. The Negligence Law Section strives to protect the public's right to jury trials, to enhance the practice of negligence law among its members and the greater Bar, and conducts educational functions for its members and the public. The Negligence Law Section's stated goal is to unwaveringly promote the fair, equitable and speedy administration of negligence litigation in the Michigan trial and appellate courts.

As attorneys working in the field of law most directly implicated by this case, and as a section of the Bar whose primary objective is the preservation of the right to a jury trial, the Negligence Law Section is directly concerned with the outcome of this case on behalf of the Bar, the Section's members, and, most importantly, the members of the public, whose right to a fair remedy is in jeopardy.

CONCURRENCE WITH STATEMENT OF THE BASIS OF JURISDICTION

Amicus Curiae Negligence Law Section of the State Bar of Michigan concurs with the Statement of the Basis of Jurisdiction by Defendant-Appellant Michigan Department of Transportation in its Brief on Appeal.

QUESTIONS PRESENTED[1]

I. **DID THE TRIAL COURT AND THE COURT OF APPEALS PROPERLY CONCLUDE THAT, PURSUANT TO MCL 691.1405, A PLAINTIFF WHO SUFFERS BODILY INJURY IS ENTITLED TO THE RESULTING ECONOMIC DAMAGES?**

TRIAL COURT ANSWERED: YES
COURT OF APPEALS ANSWERED: YES
DEFENDANT-APPELLANT ANSWERED: NO
PLAINTIFF-APPELLEE ANSWERED: YES
AMICUS CURIAE ANWERS: YES

[1] The Negligence Law Section notes that in its order granting Defendant's Application for Leave to Appeal, this Court noted the existence of an additional issue on appeal, which is a factual issue relating to whether this specific Plaintiff "incurred a loss of income from work that she would have performed as opposed to a loss of earning capacity." The Negligence Law Section takes no position regarding that fact-specific inquiry and instead limits its briefing to the general question regarding the meaning of the term "bodily injury."

STATEMENT OF FACTS

This cause of action arises out of an automobile accident. On February 13, 2007, a salt truck owned by the State of Michigan and driven by a Department of Transportation employee disregarded a stop sign and collided with Plaintiff's Heather Lynn Hannay's vehicle. The accident caused an injury to Plaintiff's shoulder, which necessitated a minimum of four surgical procedures.

As a result of the accident, Plaintiff brought suit against the Michigan Department of Transportation and the matter proceeded to a bench trial. At the conclusion of the Plaintiff's case, Defendant brought a motion to dismiss any portions of Plaintiff's claim for damages relating to work loss. Defendant argued that MCL 691.1405, only allowed a Plaintiff to recover for bodily injury or property damage and that work-loss was not encapsulated by the term "bodily injury." The Court of Claims disagreed and awarded the Plaintiff $474,904 in noneconomic damages as well as $767,076 for work-loss and $153,872 in allowable expenses.

Defendant subsequently appealed the ruling of the Court of Claims. While Defendant did not challenge the propriety of the award of non-economic damages, Defendant again asserted that work-loss damages were not available under the motor vehicle exception because such damages were not properly characterized as "bodily injury." In support of its position, Defendant directed the Court of Appeals to this Court's decision in *Wesche v Mecosta Co Rd Comm*, 480 Mich 75; 746 NW2d 847 (2008). As is discussed in depth below, *Wesche* involved the interpretation of the term "bodily injury."

The Court of Appeals rejected Defendant's argument regarding the application of *Wesche* to the present case. The Court asserted that defendant was advocating for a "momentous change in the law" and explained that at issue in *Wesche* was whether the Plaintiff could recover damages for loss of consortium where she suffered from no physical injury to her body. Because the

Plaintiff in the present case suffered a threshold injury under the No-Fault Act, the Court of Appeals concluded that she was entitled to work-loss because work-loss is simply an "item" of damage that arises out of the bodily injured and that recovery of that loss was permitted by MCL 691.1405. Consequently, the Court of Appeals affirmed the verdict of the Court of Claims.

Defendant's subsequently sought leave to appeal the decision of the Court of Appeals. This Court granted that Application for Leave to Appeal on September 27, 2013. Now, on appeal to this Court, Defendant maintains that the Court of Appeals improperly disregarded *Wesche* and legally erred in concluding that the term "bodily injury" as used in the MCL 619.1405 includes damages for economic loss. For the reasons set forth below, the Negligence Law Section of the State Bar of Michigan disagrees and respectfully requests that this Honorable Court affirm the opinion of the Court of Appeals with respect to the issue of economic damages. Further, with this opportunity to examine the meaning of the term "bodily injury" and to determine what damages are available under MCL 691.1405, the Negligence Law Section urges this Court to examine the opinion of the Court of Appeals in *Hunter v Sisco*, 300 Mich App 229; 832 NW2d 753 (2013). Like the defendant in the present case now attempts to do, the Defendant in *Hunter* successfully advocated for the elimination of a type of damages that has historically been available under MCL 691.1405. Should the Defendant in the present case likewise succeed, the public's right to recover for bodily injury under MCL 691.1405 will be all but eliminated.

STANDARD OF REVIEW

The question before this Court arises out of Defendant's assertion that the governing statutory provisions did not allow for the trial court to award Plaintiff economic damages. As this Court has stated, issues of statutory interpretation are reviewed de novo. *Hunter v Hunter,* 484

Mich 247, 257; 771 NW2d 694 (2009).

ARGUMENT

I. The Court of Appeals properly concluded that MCL 691.1405 allows for the recovery of economic damages in connection with bodily injury

As the Statement of Interest of Amicus Curiae expresses, the Negligence Law Section strives to unwaveringly promote the fair, equitable and speedy administration of negligence litigation, as well as ensure that the right to a jury trial is protected in negligence actions. In the present instance, the position of the Department of Transportation regarding the meaning of the term "bodily injury" threatens those objectives. Simply stated, to adopt the position set forth in Defendant's Brief on Appeal regarding the availability of economic damages under MCL 691.1405 would be to eliminate an individual's ability to obtain any meaningful remedy after being injured in connection with a government-owned motor vehicle. Such an outcome runs contrary to both the intent of the Legislature and well-established tenets of statutory interpretation.

A. *Wesche, Hunter* and the current state of the remedy under MCL 690.1405.

As Justice Young explained in his dissent to the order issued in *Chambers v Wayne County Airport Auth*, 483 Mich 1081, 765 NW2d 890 (2009), the civil immunity enjoyed by modern governments finds its roots, like so many aspects of our legal system, in the English common law. Governmental immunity is essentially a philosophical construct premised on the notion that because the sovereign is the *source* of the law, it can only be held liable *under* the law when it so allows.

In 1964, the Legislature drafted several provisions, including MCL 691.1405, with the purpose of delineating the instances in which the State of Michigan would allow itself to be held

liable under the law. MCL 691.1405 provides, in part, that "[g]overnmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner." Presently before this Court is Defendant's appeal in which it asserts that when the Legislature wrote those words, it did not intend an injured Plaintiff to be able to recover the economic damages associated with the bodily injury caused by the government actor's negligence.

Defendant's argument regarding the meaning of the term "bodily injury" is largely premised on this Court's opinion in *Wesche v Mecosta County Road Comm'n*, 480 Mich 75; 746 NW2d 847 (2008). In *Wesche*, Daniel and Beverly Wesche brought suit after Daniel's vehicle was rear-ended by a government-owned vehicle. Daniel suffered spinal injuries as a result of the accident. Beverly, in contrast, was not present at the accident scene. Her sole claim in the cause of action was a derivative claim for loss of consortium.

The trial court dismissed Beverly's claim for loss of consortium upon holding that a claim for loss of consortium was not a claim for "bodily injury" under MCL 691.1405. The Court of Appeals affirmed the trial court and agreed that a claim for loss of consortium did not fall under the umbrella of a claim for bodily injury.[2] This Court also affirmed and, in the process, engaged in a detailed analysis of the meaning of the phrase "bodily injury" as it is used in MCL 691.1405. Upon consulting a dictionary definition, this Court concluded that the Legislature intended the term "bodily injury" to mean "physical or corporeal injury to the body." Because Beverly did not personally suffer any physical or corporeal injury to her body, she was not a contemplated

[2] Interestingly, two of the Court of Appeals panel members who held that summary disposition was proper in *Wesche*, Judges Kirsten Frank Kelly and Joel P. Hoekstra, sat on the Court of Appeals panel in the present case and concluded that summary disposition was improper. While Defendant asserts that the Court of Appeals panel in this case failed to properly apply this Court's opinion in *Wesche*, Judges Kelly and Hoekstra's involvement in both cases serves to demonstrate that the present case is distinguishable from *Wesche*.

beneficiary of MCL 691.1405.

Embracing that definition of bodily injury from *Wesche*, defendant now asserts that to the extent that a plaintiff suffers lost wages after being physically injured, those lost wages are not a "physical or corporeal injury to the body" for which defendant is liable in a subsequent action. Defendant argues that whether the plaintiff in question is like Beverly Wesche, who suffered no physical injury, or is like Heather Lynn Hannay, who suffered injury necessitating surgical intervention, is inconsequential. Instead, Defendant argues on page nine of its brief that a plaintiff like Heather, who does suffer bodily injury, may obtain a remedy for that injury through awards of non-economic damages.

As the Plaintiff correctly indicates in her brief to this Court, Defendant's insinuation that the Legislature intended to remedy an individual's bodily injury through the award of non-economic damages has been recently addressed (and rejected) by the Michigan Court of Appeals in *Hunter*. In *Hunter*, the plaintiff's vehicle was struck by a dump truck owned by the City of Flint. *Hunter*, 300 Mich App at 231. The plaintiff suffered injuries to his lumbar spine and subsequently sought damages for those injuries, as well as for shock, emotional damage, pain and suffering. The trial court ruled that the damages plaintiff sought were available under the language of MCL 691.1405. The Court of Appeals subsequently reversed that holding.

The *Hunter* opinion, which was issued several months prior to Defendant filing its Brief on Appeal in this case, explicitly held that the Legislature's use of the term "bodily injury" in MCL 691.1405 precludes a plaintiff from recovering for any pain, suffering or emotional harm incurred as a result of the negligent use of a government-owned motor vehicle. The *Hunter* Court stated that "if the Legislature wanted to permit plaintiffs to recover within the motor vehicle exception damages for pain and suffering or emotional shock or stress, it could have done so by providing

for 'personal injury' or emotional damages in the statute." *Hunter*, 300 Mich App at 240. The Court concluded that the non-economic damages at issue "simply do not constitute physical injury to the body and do not fall within the motor vehicle exception." *Id.* at 241. Following the issuance of that opinion, the *Hunter* plaintiff sought leave to appeal in this Court. The application was denied on November 20, 2013.

Barring further action by this Court, the published opinion in *Hunter* prevents any individual from recovering for pain, suffering and emotional harm attributed to his or her bodily injury, while the Court of Appeals opinion in this matter permits a plaintiff to recover for economic loss in connection with bodily injury. Consider, then, what an injured individual's remedy agasint a government actor will be if this Court were to adopt this Defendant's position regarding the availability of economic damages under MCL 691.1405. An injured individual would be unenviably tasked with placing a numerical value on his damages without reference to how that injury impacted him economically and without reference to how the injury caused him to physically and emotionally suffer. It is respectfully submitted that in such a situation, there would cease to exist any meaningful remedy in connection with the "liable for bodily injury" provision of MCL 691.1405. This is particularly true where under the provisions of the No-Fault Act, the only damages a plaintiff could ever recover from a liable defendant would be excess wage loss and the non-economic damages already eliminated in *Hunter*.

B. This Court should reject Defendant's overly-narrow interpretation of the phrase "liable for bodily injury."

It is well-accepted that the objective of statutory interpretation is to ascertain and effectuate legislative intent. *Fisher Sand & Gravel Co v Neal A Newbie, Inc*, 494 Mich 543, 560 (2013). "In attempting to discharge this duty, [this Court has] relied on traditional tools of interpretation to

determine what constitutes the most reasonable meaning of relevant statutory provisions." *People v Tennyson*, 487 Mich 730, 756 (2010).

The Negligence Law Section's analysis begins by discussing the interplay between *Hunter* and the present case because understanding that Defendant's position, in combination with *Hunter*, eliminates any meaningful remedy is an essential first step to understanding what the Legislature intended when it used the phrase "liable for bodily injury" in MCL 691.1405. To know that Defendant's position would leave no meaningful remedy in connection with a "bodily injury" is to immediately understand that Defendant's proffered meaning of that provision *cannot* be "the most reasonable meaning."

Defendant's interpretation of MCL 691.1405 cannot be seen as "the most reasonable meaning" of that provision because that interpretation depends on the premise that the Legislature intentionally created an exception without a remedy. As this Court has stated, "[a]s far as possible, effect should be given to every phrase, clause, and word in the statute." *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999). Likewise, "it is well established that '[i]n interpreting a statute, we [must] avoid a construction that would render part of the statute surplusage or nugatory.'" *Robinson v City of Lansing*, 486 Mich 1 (2010), quoting *People v McGraw*, 484 Mich 120, 126, 771 NW2d 655 (2009). Accepting that *Hunter* has eliminated the availability of non-economic damages under MCL 691.1405, adopting Defendant's position in this case would render the entire phrase "liable for bodily injury" nugatory.

The well-accepted prohibition against rendering statutory language nugatory is particularly apt in the present case where the statute at issue establishes an exception to governmental immunity. Again, as is stated above, the default rule regarding a government actor is that the actor is immune from liability. For liability to be had, the Legislature must create an applicable

exception. Why then, if the intent was for there to be no recovery for economic or non-economic damages under MCL 691.1405, did the Legislature act at all? Stated differently, if the Legislature intended for individuals to have no remedy in connection with a bodily injury, the easier path would have been to remain wholly silent and allow the government's natural state of immunity to continue.

Just as Defendant's position regarding MCL 691.1405 must be rejected because it would render the Legislature's words nugatory, it must also be rejected because it would result in an absurdity. "[I]t is a venerable principle that a law will not be interpreted to produce absurd results." *K Mart Corp v Cartier, Inc*, 486 US 281, 324 n 2; 108 S Ct 1811; 100 L Ed 2d 313 (1988) (Scalia, J., concurring in part and dissenting in part) (quoted by Markman, J. when concurring in *Cameron v Auto Club Ins Ass'n*, 476 Mich 55 (2006).

The Negligence Law Section is cognizant of the fact that the "absurd results" doctrine is not a doctrine to be blindly cited whenever a party disagrees with the clearly intended consequences of the Legislature's actions. Here, however, Defendant is advocating that the Legislature intended to preclude individuals from recovering for economic loss connected to undisputed bodily injuries. The Court of Appeals has already concluded in *Hunter* that the Legislature intended to preclude those same individuals from recovering for non-economic loss. Taken together, the combined position is that the Legislature intended to use its limited time and resources to craft a piece of legislation that is entirely without effect. That interpretation is indeed absurd.

Additionally, the Negligence Law Section submits that there is evidence by way of acquiescence that *both* non-economic and economic damages were intended to be available under MCL 691.1405. Under the interpretative tool known as legislative acquiescence, when a party

contends that a long-existing statute has been historically misinterpreted and misapplied, a Court may consider the Legislature's failure to a correct that misinterpretation as evidence that there *was* no misinterpretation at all. Admittedly, this Court has in recent years harshly criticized the use of legislative acquiescence. However, as Justice Kelly stated while dissenting in *McCahan v Brennan*, 492 Mich 730, 757 n 22; 822 NW2d 747 (2012), that particular tool of statutory interpretation has been utilized by the United States Supreme Court in relatively recent years. See *Shepard v United States*, 544 U.S. 13, 23; 125 S Ct 1254; 161 L Ed 2d 205 (2005).

The Negligence Law Section submits that under these particular circumstances, the theory of legislative acquiescence further supports affirming the Court of Appeals. As the panel below stated,

> now—more than 48 years since the GTLA was enacted, during which time economic damages have presumably been routinely awarded—defendant argues that the language of the motor vehicle exception precludes awarding economic damages as provided pursuant to MCL 500.3135(3)(c) because the damages recoverable pursuant to the motor vehicle exception are for the treatment of the bodily injury itself but not the broader damages associated with the bodily injury.

The statutory scheme at issue in this case is not new. As the Court of Appeals noted, Defendant is advancing a position that has not arisen in the nearly half-century during which this statutory language has existed. In that time, it is not simply the Legislature that has remained silent regarding a particular approach. Rather, the legal community as a whole has accepted that both non-economic and economic damages alike are available in connection with a bodily injury under MCL 691.1405. It is not unreasonable to conclude that the inaction of the Legislature from 1965 onward is a more reliable indication of that body's intent than a definition from a dictionary published 35 years after the legislation at issue.

Much like the doctrine of stare decisis disfavors departing from legal principles that have come to be relied on by the public, so to should this Court be hesitant to erase 50 years of universal

acceptance of the meaning of MCL 691.1405. Unlike the majority's concern in *McCahan*, the Negligence Law Section is not inviting this Court to embrace legislative acquiescence at the expense of otherwise clear statutory language. Rather, legislative acquiescence is but one of many interpretive approaches that favors affirming the Court of Appeals.

C. Plaintiff properly states that the position Defendant now advances is inconsistent with the Government Tort Liability Act.

With the understanding that an Amicus Curiae brief that merely adopts the reasoning of one of the parties is of little utility, the Negligence Law Section endorses Plaintiff's well-reasoned analysis regarding the GTLA's interchange of the terms "injury" and "bodily injury." Rather than reiterate Plaintiff's thorough overview of the GTLA's multiple uses of each of those terms, The Negligence Law Section instead generally notes that it is well-accepted that "'courts will regard all statutes upon the same general subject matter as part of one system.'" *Robinson*, 486 Mich at 8 n 4, quoting *Dearborn Twp Clerk v Jones*, 335 Mich 658, 662, 57 NW2d 40 (1953).

When the *Hunter* Court adopted a position similar to the position now advocated by this Defendant, it held that if the Legislature intended to provide a remedy for non-economic damages, it would have used a term such as "personal injury" instead of "bodily injury." Yet the GTLA's interchangeable use of "injury" and bodily injury" calls into question the level of precision and measure that the Legislature employed in that statutory scheme.

Rather than conclude that the Legislature used the term "liable for bodily injury" as a way of precluding a plaintiff from recovering both non-economic and economic damages, it is more likely that the Legislature used that particular phrase in MCL 691.1405 in an effort to be expansive. The Legislature intended to provide a remedy to those who were physically injured as well as those who suffered property loss. The use of the term "bodily injury" as opposed to "personal injury"

or just "injury" was likely nothing more than a stylistic choice intending to more fully demonstrate the spectrum of damages that were available.

No portion of the GTLA portends to limit the types of damages ordinarily available to an injured party. Rather, the statutory scheme details the situations in which government actors may be held liable for their negligent conduct. As opposed to somehow setting forth the scope of damages available to a plaintiff, the term "bodily injury" in MCL 691.1405 simply sets forth an occurrence that triggers a plaintiff's right to access the full spectrum of remedies available under the law of torts. Such an interpretation is not inconsistent with the statutory language, nor is it inconsistent with the language in *Wesche*.

CONCLUSION

In enacting MCL 691.1405, the Legislature recognized the need for individuals who were injured by the negligent use of a government-owned motor vehicle to be able to obtain remedies for their injuries. Over the roughly 50 years that followed, individuals who suffered bodily injury successfully recovered both their economic and non-economic damages without any indication that those remedies were precluded by the relevant authority. Now, within the course of one year, there has been a concerted effort to eliminate any meaningful remedy for bodily injury under MCL 691.1405. That effort finds no support in the applicable statutory language and is antithetical to the stated objectives of statutory interpretation. Consequently, this Court should acknowledge the Legislature's intent to make available the full spectrum of damages (both economic and non-economic) to those that suffer bodily injury in connection with the negligent use of a government-owned motor vehicle and affirm the opinion of the Court of Appeals.

Relief Requested

The Negligence Law Section respectfully requests that this Honorable Court affirm the Court of Appeals with respect to the issue of the operation of MCL 691.1405. The Negligence Law Section further requests that this Court disavow the *Hunter* opinion's elimination of an injured individual's right to non-economic damages.

Respectfully submitted,

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